
(2011) 01 KAR CK 0233

In the Karnataka High Court

Case No : IT Appeal No's. 3149 of 2005, 126, 922 of 2007 and 231 of 2008

Commissioner of Income Tax and Another

APPELLANT

Vs

Baehal Software Ltd.

RESPONDENT

Date of Decision : 25-01-2011

Acts Referred:

Finance Act, 1994 — Section 10 B, 10 B (1)

Citation : (2011) 240 CTR 316 : (2011) 339 ITR 368

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : M.V. Seshachala, for the Appellant; S. Parthasarathi, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—These four appeals are preferred by the Revenue in respect of four assessment orders. Though, there are four separate assessment orders, the reasoning given by the AO is the same, which has now been set aside by the Tribunal. Accordingly, all the appeals are taken up together for consideration and disposed of by this common order.

2. The Assessee is a company engaged in the business of development and export of software. It is a joint venture of HAL and British Aerospace. The Assessee filed its return of income for the asst. yr. 1999-2000 declaring a total income and claiming exemption u/s 10B of various amounts in each of the assessment orders. The AO has disallowed the exemption u/s 10B on the ground that the Assessee has commenced production much prior to 1st April, 1994 i.e., before Section 10B was amended by the Finance Act, 1994 which came into effect from 1st April, 1994. As the Assessee does not satisfy the requirement mentioned in the section, he is not entitled to exemption. Aggrieved by the said order of the AO, the Assessee preferred an appeal before the CIT(A) who set aside the order and allowed the appeal and held that the Assessee is entitled to exemption u/s 10B. Aggrieved by the same, the Revenue preferred an appeal to

the Tribunal, which upheld the order of the appellate authority, based on the Circular No. 684, dt. 10th June, 1994 [(1994) 119 CTR (St) 25] issued by CBDT. Aggrieved by the same, the Revenue is in appeal.

3. The Learned Counsel appearing for the Revenue, assailing the impugned order contends that Section 10B was introduced into the statute by Finance Act, 1988 w.e.f. 1st April, 1989. The amendment relied upon came into effect from 1st April, 1994. Before eligible for that benefit, as it is clear from the section, the Assessee has to satisfy two conditions. Firstly, the total exports of the Assessee should be more than 75 per cent of its total turnover. Secondly, the Assessee must have commenced production subsequent to 1st April, 1994. In the instant case, admittedly, the Assessee has commenced production prior to 1st April, 1994 viz., 26th July, 1993 and the export is less than 75 per cent. Since, the Assessee does not satisfy any of the conditions, the AO was justified in disallowing the said deductions, which order has been wrongly set aside by both the appellate authorities.

4. Per contra, the Learned Counsel appearing for the Assessee supported the impugned order.

5. In order to appreciate the rival contentions, it is necessary to know the law prior to this amendment i.e., 1st April, 1994. Section 10B was introduced into the statute by Finance Act, 1988 w.e.f. 1st April, 1989. Prior to 1st April, 1994, Sub-section (1) of Section 10B was as follows:

10B. (1) Subject to the provisions of this section, any profits and gains derived by an Assessee from a hundred per cent export-oriented undertaking (hereafter in this section referred to as the undertaking) to which this section applies shall not be included in the total income of the Assessee.

(2)to(9A)....

6. The phrase "hundred per cent export-oriented undertaking" has been defined in Expln. 2(iv) of Section 9A [sic-below Sub-section (9A)] as under:

2(iv) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and the rules made under that Act.

7. As the definition of "hundred per cent export-oriented undertaking" stood then, it is not the requirement of the law that such an undertaking should have exported its entire production. The requirement is obtaining a certificate from the concerned authority.

8. As it is clear from the Circular No. 684, dt. 10th June, 1994 issued by the Board explaining the amendment brought about "restricting five-year tax holiday u/s 10B of the Income Tax Act to 100 per cent EOUs exporting at least 75 per

cent of their turnover", which reads as under:

23. u/s 10B of the Income Tax Act, a five-year tax holiday is allowed to a 100 per cent EOU which manufactures or produces any article or thing and is approved by the prescribed Board. This tax holiday was in operation since the asst. yr. 1989-90.

23.2 100 per cent EOUs, as the name signifies, get special treatment by virtue of the fact that they export their entire produce. However, in order to provide economic flexibility to them and allow them to dispose of the export rejects and by-products, they are allowed to sell 25 per cent of their product in the domestic market. In effect, such units get exemption for five years even in respect of profits from the 25 per cent domestic sales allowed to them.

23.3 As long as domestic sales of 100 per cent EOUs are within reasonable limits, such sales getting exempt can be justified as a concession incidental to export. Recently, however, it has come to notice that several units approved as 100 per cent EOUs export less than 75 per cent of their turnover and sell the balance amount in the domestic market. Such units are, thus, getting the five-year tax holiday even on the profit generated from domestic sales forming more than 25 per cent of the total sales.

23.4 With a view to ensuring that 100 per cent EOUs avail of the tax exemption only if the exports are substantial, Section 10B has been amended restricting the five-year tax holiday to 100 per cent EOUs which export at least 75 per cent of their turnover. Units which, in any previous year, export less than 75 per cent of their turnover will not be allowed the exemption u/s 10B in respect of that previous year. They can, in such a case, avail of the normal 100 per cent deduction u/s 80HHC on the export profits. The restriction will apply prospectively to 100 per cent EOUs which commence production on or after 1st April, 1994.

23.5 This amendment takes effect from 1st April, 1995 and will, accordingly, apply in relation to the asst. yr. 1995-96 and subsequent years.

9. Therefore from the said clarificatory circular, it is clear that Section 10B was introduced in the year 1989 and the heading of the section made it clear-special provision is in respect of newly established 100 per cent export oriented undertaking. Even if those establishments were not exporting the substantial portion of what it manufactures, by mere obtaining a certificate under the Act, they were enjoying the benefit by selling their products in the local markets. After seeing how this provision has been abused by such EOUs, the proposed amendment was brought in w.e.f. 1st April, 1994. By the proposed amendment, merely because a unit has obtained a certificate from the concerned authorities, that is not sufficient to avail the benefit of exemption. After obtaining such a certificate, they must demonstrate that 75 per cent of their manufactured items have been exported. From this undisputed fact, it is clear that the units, which are established prior to 1st April, 1994, have the advantage of claiming this

exemption even by exporting a fraction of their production. The mischief is sought to be avoided by this amendment by prescribing 75 per cent as the level of exports, which has to be satisfied by the Assessee.

10. In that view of the matter, by a wrong interpretation, the AO has disallowed the exemption. When the Assessee could have availed the benefit under the said section without exporting anything on the basis of a mere certificate, which was granted in their favour, both the appellate authorities were justified in interfering with the assessment orders and setting aside the same. We do not see any merit in these appeals. No substantial question of law is involved. Hence, all these appeals are dismissed. No costs.